

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue date: 07May2002

In the Matter of

Ronald F. Wozniak,
Claimant

v.

Universal Maritime,
Employer

and

The Schaffer Company,
Carrier

Case No.: 2001-LHC-3365
OWCP No.: 04-35385

Appearances:

Myles R. Eisenstein, Esq.
For the Claimant

Lawrence Postol, Esq.
For the Employer

Before: Linda S. Chapman
Administrative Law Judge

**DECISION AND ORDER
GRANTING BENEFITS**

This proceeding involves a claim for benefits under the Longshore and Harbor Worker's Compensation Act, as amended, 33 USC § 901, et seq. (hereinafter LHWCA). A hearing was held before me in Baltimore, Maryland, on January 17, 2002, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Claimant's Exhibits 1 through 13 and Employer's Exhibits 1 through 20 were admitted

into evidence; Employer's Exhibit 22 was admitted post-hearing.¹ The Claimant's post-hearing brief was filed on April 2, 2002; the Employer's post-hearing brief was filed on March 13, 2002. I have reviewed and considered these briefs in making my determination in this matter.

I. Statement of the Case

Testimony of the Claimant

The Claimant, Ronald Wozniak, is 43 years of age, and has been a longshoreman for 25 years. He works as a gang carrier/foreman for Universal Maritime (Tr. 20-21). As a gang carrier/foreman, he supervises, orders containers for the barges and ships and directs them to the proper locations, and directs the crane operators as to where to put containers on or off the barge (Tr. 21). The Claimant previously injured his back in 1996, when he slipped on a platform while climbing into a crane. He was out of work for six weeks, and returned to work without restrictions in June 1996 (Tr. 22).

On the days when there is no work as a gang carrier/foreman, the Claimant gets jobs out of the union hall, anything from lashing, to driving a crane, driving automobiles, or driving yard hustlers (Tr. 23-24). The Claimant explained the entries in his workbook for 2001, indicating that on some days he worked two jobs, one as a foreman, and one as a truck driver or hustler; he was paid a full day's wages for each job (Tr. 35-38). According to the Claimant, this is a frequent practice, due to the shortage of qualified workers (Tr. 69). The Claimant acknowledged that there were no entries referring to any injury or back problem; the purpose of his book was to keep track of hours (Tr. 43). The Claimant also acknowledged that some of the entries reflected work that the Claimant reported under his son's number, so that his son got credit for the hours. These entries were designated by his son's name, Ronnie (Tr. 58). According to the Claimant, this is a common practice on the waterfront; the purpose was to enable his son to qualify for benefits (Tr. 67-68).

On April 6, 2001, the Claimant arrived at work at about 7:00 a.m. He was working as a foreman, handing out slips, ordering trucks, and directing operators where to put boxes on the barge or take them off (Tr. 24). One of the hustler drivers had his window three-quarters of the way shut, and every time he came around, the Claimant had to stretch to hand him a slip. The Claimant began getting a twinge in his back, at about the belt line. He told his superintendent that his back was starting to hurt (Tr. 25-26). However, the Claimant wanted to keep the operation going, so he kept working until noon. At that time, his back was aching badly (Tr. 26-27). As the weekend went on, the pain became worse, and on Monday, after he checked in for work, about 8:30 a.m., the Claimant called a doctor (Tr. 28). He selected Dr. Fedder, who was on the list with his health plan, but was told that he would not be in until Wednesday (Tr. 29, 45). The

¹ In making my determination, I have not considered an office note from Dr. Slaughter, dated April 16, 2002, or a memo from Dr. Slaughter, dated April 19, 2002, forwarded by Claimant's counsel along with a request for an expedited decision.

Claimant worked on the Monday after the injury, but he did the job of a gang carrier, a job that is physically easier than that of foreman, until he could find out what was wrong with his back (Tr. 33-34).

The Claimant saw Dr. Fedder on Wednesday, April 11, after he checked in for work as a gang carrier (Tr. 47-48). He told his supervisor, Leo Finn, that he needed to go to the doctor about his back (Tr. 62). When he saw Dr. Fedder, the Claimant did not tell him how his injury occurred; he was more concerned with getting treatment. According to the Claimant, Dr. Fedder asked him when the pain started, and where he hurt, but not how he had injured himself (Tr. 76). The Claimant thought that Ms. Straw-Thomas would reject the bill, so he told the office to bill his insurance company (Tr. 72-73). Nor did Dr. Knight, from the Center, ask him about when the pain started, or whether he had an accident or injury (Tr. 77-78).

The Claimant gave a disability slip to Chuck Colgan, the safety man, on April 25, telling him that he could not work until he got treatment for his back (Tr. 62-63). Subsequently, the Claimant spoke with Ms. Straw-Thomas, from the carrier; Ms. Straw-Thomas noted that he had a 1996 back injury, and the Claimant told her that he would not know if his current problems were related to that injury until he went to the doctor (Tr. 63-64). Ms. Straw-Thomas did not believe that there had been an accident, and told the Claimant that his problems were due to his 1996 injury (Tr. 70-72). On May 21, 2001, Ms. Straw-Thomas told him that his 1996 claim was time-barred; the Claimant met with counsel the next day, and filed his claim for compensation (Tr. 72).

Dr. Fedder referred the Claimant to Dr. Liu, who gave him three nerve block shots. According to the Claimant, the shots helped about 50%, but he still has days when he has unbearable shooting pains down his legs (Tr. 29-30). Dr. Fedder eventually told the Claimant he needed surgery. The Claimant went to Dr. Slaughter on referral by his attorney; Dr. Slaughter also suggested surgery. The Claimant has not had surgery as yet (Tr. 30-31). He has been able to do his work since he returned in June 2001, although he has to be careful when he bends or squats (Tr. 31).

According to the Claimant, the low back pain he has had since April 6, 2001 is different from the back pain he had in 1996, which was milder, and on the left side, as opposed to the right side (Tr. 32). When he does heavier labor, such as lashing and getting in and out of cars, he has shooting pain down his leg (Tr. 64-65). The Claimant takes four or five ibuprofen at bedtime, and sometimes at mid day (Tr. 33). He has not injured his back in any way since April 6, 2001 (Tr. 33). He has not seen a doctor for his back since Dr. Fedder released him on June 25, 2001 (Tr. 60-61).

According to the Claimant, the contract year runs from October 1 to September 31; after 675 hours, he qualifies for vacation pay; after 700, for royalty pay; and after 800, for holiday pay (Tr. 66-67).

The Claimant provided a tape-recorded statement to Beth Straw-Thomas, the carrier's

representative, on May 14, 2001 (EX 12). Ms. Straw-Thomas asked him about his earlier accident on April 18, 1996; the Claimant indicated that he slipped while coming out of a crane, and ruptured some discs in his back. He stated that he has had back problems, "more or less," since that time. The Claimant also described his injury of April 6, 2001. He indicated that the pain he was having was the same pain he had in 1996, in the same part of his body, his low back. However, he also had pain down his left leg, whereas in 1996 he had pain down his right leg.

Dr. Ira L. Fedder

Dr. Fedder examined the Claimant on April 11, 2001 (CX 5). He noted that the Claimant had been experiencing low back pain radiating into his left thigh and calf, and numbness and tingling in the foot. Dr. Fedder indicated that the Claimant's pain began about four days earlier, without known injury or trauma. The Claimant had similar pain four years earlier, after falling at work, and being diagnosed with a herniated disc at L5-S1. On examination of the Claimant, Dr. Fedder noted a slightly antalgic gait; lumbar flexion was limited to 20 degrees, and extension to 10 degrees. There was decreased sensation to light touch on the lateral calf, anterior foot, and great toe of the left foot. X-rays showed disc space narrowing at L4-5 and L5-S1, with a large osteophyte on the anterior aspect of the L4 vertebral body. No spondylolisthesis was seen. Dr. Fedder's impression was low back pain with left leg radiculopathy, probably the result of a recurrence of a herniated disc at L5-S1. He sent the Claimant for an MRI, and instructed him to start on physical therapy.

Dr. Fedder saw the Claimant on April 25, 2001 (CX 6). He noted that the Claimant had been unable to go to physical therapy for "insurance reasons." The Claimant indicated that his pain had improved somewhat, but he still complained of left leg pain radiating into his anterior ankle with numbness and tingling. Dr. Fedder reviewed the MRI report by Dr. Winthrop, which showed:

- 1) Left posterolateral disk protrusion L4-5 with encroachment on the left neural foramen and rostral migration of disk fragment to the left L4 lateral recess correlate with left L4-5 and left L5 radiculopathy.
- 2) Right paracentral disk protrusion L3-4 correlate with right L4 radiculopathy.
- 3) A central disk protrusion at L1-2 extending slightly asymmetrically to the right.
- 4) Small right paracentral disk protrusion at T11-12.
- 5) Annular bulge L5-S1.

Based on the MRI findings, as well as the fact that the Claimant's symptoms were persistent, Dr. Fedder recommended an epidural steroid injection and selective nerve root block. He indicated that the Claimant would continue with physical therapy.

Dr. Fedder saw the Claimant again on May 9, 2001 (CX 7). He noted that the Claimant was having significant back and leg symptomatology, predominantly in the left leg, radiating down the lateral aspect of the calf and into the dorsum of the foot towards the left toe. He also had some weakness in the tibialis anterior on the left side, and a positive straight leg raising test on the

left. He also had some numbness in his great toe. On reviewing the Claimant's MRI, Dr. Fedder felt that he clearly had a fairly large L4-5 disk herniation, with proximal migration of the fragment. He also had a right L3-4 disk protrusion, and a broad based annular bulge at L5-S1, which was an improvement as compared to 1996, when he had a disk herniation on the right side at that level. Dr. Fedder felt that, at that point, the Claimant was a candidate for surgery, specifically, a partial laminectomy of L4 and L5, and an L4-5 discectomy.

Ruxton Surgicenter

The Claimant underwent a lumbar epidural steroid injection at L4-5 on May 1, 2001 (EX 15). The report by Dr. Maywin Liu notes that the Claimant reported a gradual onset of pain approximately a month earlier, and that he did not report any trauma or injuries at that time.

Dr. Festo G. Miela

Dr. Miela saw the Claimant on May 9, 2001, at the request of the Employer (EX 7). The Claimant reported that he developed pain in his back about a month earlier, and went to his private physician. He told Dr. Miela that the pain began insidiously without any relevant accident or incident. The Claimant stated that his pain was constant, and radiated to both thighs, particularly to the entire left leg, foot, and big toe. Dr. Miela noted that the Claimant had undergone an MRI, which, according to the Claimant, showed a herniated disk at L4-5, but Dr. Miela did not have any confirmation of this. Dr. Miela indicated that the Claimant had a back injury in 1996. According to Dr. Miela, the Claimant walked with an antalgic gait and limp, favoring the left side. On inspection of the Claimant's back, Dr. Miela found no abnormality or deformity, and the lordotic and kyphotic curves were maintained. He did find tenderness at the lower portion of the back, across the lumbosacral area, and tightness and tenderness along the parasternal muscles bilaterally. His forward flexion was 60 degrees, extension 20 degrees, and side to side movements 10 degrees. His deep tendon reflexes were diminished bilaterally at the patella and Achilles tendons; circulation and sensation appeared within normal limits.

Dr. Miela diagnosed the Claimant with back pain, and a probable herniated disk, according to the Claimant's history. He indicated that the Claimant's care was transferred to his private physician, for this non-work ailment.

Dr. D. Graham Slaughter

Dr. Slaughter saw the Claimant on June 20, 2001 (CX 2). He noted that since the time of his on the job injury of April 6, 2001, the Claimant had persistent discomfort in his left low back, with extension of pain into his left buttock, posterior thigh, calf and ankle of his left leg. Three epidural injections had not been beneficial. On examination of the Claimant, Dr. Slaughter found that on limited forward bending, the Claimant began to get radicular pain in his left lower extremity. Straight leg raising on the left was positive. He had weakness of the extensor hallucis longus, associated with decreased pain appreciation in the L5 dermatome on the left foot. The

MRI showed an L4-5 ruptured disc on the left side, extending into the left L4 recess (CX 11). Dr. Slaughter felt that in view of his persistent radicular pain, the Claimant was a candidate for surgery. He noted, however, that the Claimant wanted to try to go back to work before considering surgery. Dr. Slaughter did not feel that the Claimant could continue to work, and that he would eventually return for the surgery.

Dr. Slaughter wrote to Beth Straw-Thomas on July 19, 2001, in response to correspondence from her (CX 3). He indicated that the Claimant had told him that on April 6, 2001, he was doing his job of handing out assigned parking locations to truck drivers in their vehicles, and that in order to give a slip of paper to one of the drivers, he had to extend his body in an upright lateral fashion to get the paper through the window, which was three quarters closed. Shortly after, he began to experience pain in his lumbar spine. Dr. Slaughter characterized the Claimant's actions as a reaching overhead maneuver associated with twisting.

Dr. Charles J. Lancelotta

Dr. Lancelotta saw the Claimant on November 3, 2001 at the request of the Employer (EX 14). The Claimant reported to Dr. Lancelotta that he was working on April 6, 2001, handing papers to truck drivers, when he developed pain in his lower back. The pain became increasingly severe, radiating down his left leg to his foot, with numbness and tingling. Dr. Lancelotta noted the Claimant's treatment by Dr. Fedder; the Claimant reported that he had undergone three injections, which decreased his symptoms by about half. The Claimant returned to work; although he avoided heavy lifting, he had persistent left leg pain radiating down his left leg to his foot, with numbness and weakness in his foot. The Claimant subsequently went to Dr. Slaughter, who agreed with Dr. Fedder's recommendation for surgery.

On examination of the Claimant, Dr. Lancelotta noted that he limped slightly, favoring his left leg. Dr. Lancelotta found no palpable lumbar spasm or interlaminar tenderness. The straight leg-raising test was negative on the right, but elevation of the left leg at about 40 degrees caused pain to radiate down the back of his left leg to the foot. There was weakness of dorsiflexion of the left foot. Range of motion of the back was limited at about 30 degrees flexion, due to discomfort radiating into the back of the left thigh to the calf. Dr. Lancelotta reviewed the April 14, 2001 MRI, which clearly showed evidence of a herniated disc at L4 on the left.

Dr. Lancelotta noted that the Claimant did not describe any accident that occurred at work, and he did not feel that his current symptoms were work-related. Nor did he feel they were related to his April 18, 1996 injury. He pointed out that the Claimant had a lumbar MRI on May 20, 1996, which did not show a herniated disc at L4. Dr. Lancelotta felt that the Claimant's symptoms were genuine, and that he definitely was a candidate for surgery. However, based on the information supplied by the Claimant, as well as his review of the records, Dr. Lancelotta did not feel that his disc herniation was related to a work injury. Dr. Lancelotta specifically pointed out that the Claimant saw Dr. Miela about a month after the injury, and told him that his pain developed a month earlier, insidiously without any relevant accident or incident.

Beth Straw-Thomas

Ms. Straw-Thomas works for the Schaffer Companies, Ltd., the third-party administrator for the Employer. She received a telefax from Chuck Colgan, the Safety Director at Universal Maritime, on April 25, 2001, indicating that he could not find any information on the Claimant's claim, and attaching an old MRI report and a disability slip from Dr. Fedder, dated April 24, 2001 (Tr. 82-83, 85). Subsequently, Ms. Straw-Thomas spoke to the Claimant, and told him that she needed to obtain the 1996 claim file, and it would be a few days before she could tell him if they could provide compensation and medical treatment (Tr. 87-88). After receiving a copy of the file, Ms. Straw-Thomas contacted the Claimant, and took a recorded statement. She determined that the Employer could not pay benefits on the Claimant's 1996 claim, as it was over five years from the last date of payment, although they could pay for medical benefits (Tr. 88). Ms. Straw-Thomas recalled that the Claimant told her that his back pain first occurred at work, while he was handing slips to truck drivers. She told him that it did not appear, from what he was telling her, that he had sustained an accidental injury, but that it appeared to be a recurrence of the 1996 claim (Tr. 97). She did not recall telling him that his current back problems were related to the 1996 accident, although she did tell him that his 1996 claim was barred by the statute of limitations (Tr. 96).

Ms. Straw-Thomas referred the Claimant to Dr. Lancelotta, who determined that the Claimant had a herniated disc, which had not been present on the 1996 MRI (Tr. 91).

1996 INJURY

Dr. Cyrus Pezeshki

Dr. Pezeshki saw the Claimant in orthopedic consultation on May 14, 1996 (EX 10). He indicated that the Claimant reported pain for the last four weeks, becoming more frequent, in the right leg, starting from the right buttock and lumbosacral and calf area. The Claimant felt weakness, and limped. Dr. Pezeshki noted that the Claimant walked with a limp on the right. On examination, he found that flexion/extension of the lumbar spine was limited to about 60 and 10 degrees, respectively. The Claimant felt pain on the right side of the lumbosacral area on palpation, percussion, and inspection of the thoracolumbosacral spine. Dr. Pezeshki noted marked decrease in the right ankle reflex. X-rays showed no significant findings. Dr. Pezeshki concluded that the Claimant had a herniated disk at L5-S1, with possible sciatica on the right, and a Baker's cyst on the right knee, which was asymptomatic. Dr. Pezeshki arranged for an MRI, and advised the Claimant to stay off work until it was performed.

The Claimant saw Dr. Pezeshki on May 24, 1996 (EX 19). Dr. Pezeshki indicated that the MRI showed disc herniation at L5-S1, more on the right than left. Dr. Pezeshki discussed different treatment options with the Claimant indicating that physical therapy could be beneficial, as the Claimant was not eager to have surgery. The Claimant agreed to undergo physical therapy.

The Claimant visited Dr. Pezeshki on June 21, 1996 (CX 1). He had undergone physical therapy, and reported to Dr. Pezeshki that he felt much better: he did not have numbness and tingling in his foot, calf, or ankle areas, but he still occasionally felt numbness in his thigh. On examination of the Claimant, Dr. Pezeshki found that he had excellent range of motion and mobility, but that his ankle reflexes on the right were still decreasing in comparison to the left. Dr. Pezeshki encouraged the Claimant to continue therapy until July 1, and then to continue therapeutic exercises at home. He released the Claimant to continue his regular activities.

On July 2, 1996, the Claimant saw Dr. Pezeshki, and reported to him that he was getting better (EX 10). Dr. Pezeshki indicated that the Claimant wanted to be on sick leave during the time he was attending physical therapy. Although Dr. Pezeshki did not tell the Claimant that he should stay off work for the whole month or two months when he was undergoing therapy, he did agree that the Claimant could not work at the same time that he was attending physical therapy sessions. Dr. Pezeshki advised the Claimant to discuss the matter with his employer.

On September 3, 1996, Dr. Pezeshki wrote to Terri Phillips at Schaffer Insurance, in response to an earlier letter (EX 10). Dr. Pezeshki indicated that the Claimant completed a questionnaire on his first visit, and in response to the question of how his condition started, put a question mark. Reviewing the information that was obtained from the Claimant, Dr. Pezeshki found nothing mentioned about how his condition started. Thus, he was unable to relate the Claimant's problem to an injury.

The Claimant visited Dr. Pezeshki on October 21, 1996 (EX 10). He reported that his condition was much better, and that he had been doing his regular work. Dr. Pezeshki asked him about the nature of his injury, and the Claimant replied that it had happened at work. On examination of the Claimant, Dr. Pezeshki found that his range of motion was improved, but he still had a decreased ankle reflex on the right as compared to the left. As the Claimant was improving, Dr. Pezeshki decided that he should continue with the same treatment regimen. Based on the Claimant's statements that his injury occurred on the pier at work, and that he did not have any pre-existing conditions or incidents, Dr. Pezeshki concluded that the Claimant's herniated disc was related to his injury of April 18, 1996.

Dr. Edward R. Cohen

Dr. Cohen saw the Claimant on June 18, 1996 (EX 11). Dr. Cohen indicated that the Claimant slipped and fell in a work-related accident on April 18, 1996, and began to develop discomfort in his back, radiating down his right lower extremity. His family doctor, Dr. Zullo, initially diagnosed a "Baker's cyst;" he then saw Dr. Gupta, who diagnosed a hamstring injury. An MRI ultimately showed degenerative disk disease with herniation (EX 9). On examination of the Claimant, Dr. Cohen found stiffness, and mild restriction of motion. There was also subjective discomfort at the extremes of motion, but no evidence of neurological deficit in the lower extremities. On reviewing the MRI, Dr. Cohen found degenerative lumbar disk disease at L5-S1 with evidence of herniation, and some degenerative spinal stenosis. His impression was lumbar

contusion-sprain, resolved, and pre-existing degenerative lumbar disk disease. In Dr. Cohen's opinion, the MRI results were not a result of the Claimant's fall. He felt that the Claimant clearly had significant pre-existing degenerative disk disease. He found no indications for surgery, and felt that the Claimant was capable of returning to work in his normal occupation as a crane operator. He found no evidence of a Baker's cyst on the Claimant's knee, or a hamstring pull in his thigh. He felt that the Claimant clearly was suffering from a pre-existing degenerative condition.

Other Evidence

The record includes a work printout for the Claimant from the Steamship Trade Association, for April 2001 (EX 4), and April 2000 through October 2001 (EX 13).

The record also includes a copy of the Claimant's 2001 calendar, on which he recorded his hours of employment (EX 20).

II. Stipulations

The parties have stipulated, and based on the record I find the following:

- I. 33 U.S.C. § 901 et seq (hereinafter the Act) is applicable to this claim.
- II. The Claimant and Employer were in an employer/employee relationship at the time of the alleged accident or injury.
- III. The date of the alleged accident or injury was April 6, 2001.
- IV. The Claimant's filing of the notice of claim was timely.
- V. The Claimant was temporarily and totally disabled from April 25, 2001 to June 24, 2001.

III. Issues

The issues before me are these:

- I. Whether an injury occurred on April 6, 2001, in the course or scope of the Claimant's employment.
- II. Whether the Claimant's temporary and total disability from April 25, 2001 to June 24, 2001 was due to an injury of April 6, 2001.
- III. The Claimant's average weekly wage.

IV. Discussion

Injury and Causation

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *Wendler v. American National Red Cross*, 23 BRBS 408, 412 (1990). It is also well-established that the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

The Act provides a presumption that a claim comes within its provisions. *See*, 33 U.S.C. § 920(a). This presumption “applies as much to the nexus between an employee’s malady and his employment activities as it does to any other aspect of a claim.” *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). The Claimant’s uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff’d*, 620 F.2d 71 (5th Cir. 1980); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Anderson v. Todd Shipyards*, *supra*, at 21; *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a “prima facie” case. The Supreme Court has held that “[a] prima facie ‘claim for compensation,’ to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment.” *United States Indus./Fed Sheet Metal, Inc., v. Director, Office of Workers’ Compensation Programs, U.S. Dept. Of Labor*, 455 U.S. 608, 615 (1982).

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Once this prima facie case is established, a presumption is created under Section 20(a) that the employee’s injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). Once the claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that the claimant’s condition was not caused or aggravated by his employment.

The Board and Courts have never required a claimant to introduce affirmative evidence establishing that working conditions in fact caused the harm; the claimant must at least show the

existence of working conditions which could conceivably have caused the harm alleged. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). The Board has held that “if something unexpectedly goes wrong with the human frame, even if this occurs in the course of usual and ordinary work, claimant has sustained an accidental injury under the Act.” *McGuigan v. Washington Metropolitan Area Transit Authority*, 10 BRBS 261, 263 (1979). *See also*, *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(if something goes wrong within the human frame, there has been an injury within the meaning of the LHWCA).

I find that the Claimant has established that he sustained physical harm or pain while at his job on April 6, 2001, as a result of an “accident or injury” that conceivably could have caused that harm or pain. The Claimant has been consistent in his description of the events of that day, and his resulting back pain. Although he did not describe how it happened, he reported to his supervisor that day, Leo Finn, that his back was bothering him. When his back did not improve over the weekend, he made an appointment with Dr. Fedder, and saw him on the following Wednesday.² The description that the Claimant gave of his activities to Ms. Straw-Thomas is consistent with the Claimant’s account at trial, and in his deposition. The medical reports and the MRI bear out that the Claimant suffered a herniated disc at L3-4, which was not present in 1996; he was conservatively treated for that condition. I had the opportunity to observe the Claimant at the hearing, and to evaluate his demeanor. I found him to be a thoroughly credible witness.

Employer argues that it has rebutted the statutory presumption, essentially claiming that the Claimant has fabricated his account of his injury on April 6, 2001. First, the Employer argues that the physician’s reports contain no reference to an accident or injury on that date. For instance, Dr. Fedder stated in his April 11 report that the Claimant’s pain began about four days earlier, without known injury or trauma. The Claimant, however, claimed that Dr. Fedder did not ask him how the injury occurred. Dr. Miela, who saw the Claimant on May 9, stated that the Claimant’s problems began insidiously, without relevant accident or incident. The Claimant did describe his activities of April 6 to Dr. Slaughter on July 19, and to Dr. Lancelotta on November 3.

However, whether the Claimant told all of the physicians what he was doing at work on April 6 is not determinative here. In fact, as consistently described by the Claimant, he did not suffer an accident, injury, or trauma, in the commonly understood meaning of these terms - his pain began, not after a single, discrete occurrence, but after a workday spent twisting, bending, and reaching. Nor is the fact that the Claimant may have believed that his pain was related to his 1996 accident dispositive, as argued by the Employer. Indeed, the record suggests that the Claimant may have initially assumed, in the absence of a discrete injury or trauma, that this was so; indeed, he had Dr. Fedder’s office send the bill to his private insurer. When Dr. Fedder reviewed the Claimant’s MRI, as he reported on April 25, it was apparent that the Claimant had

² The Employer makes much of the fact that Dr. Fedder’s records indicate that the Claimant called for an appointment on Tuesday, rather than on Monday, as testified to by the Claimant. I do not find this evidence to be determinative of any critical fact.

injuries that were not present in 1996. It was then that the Claimant gave a disability slip, signed by Dr. Fedder, to the Employer. Subsequently, he described the events of April 6 to Ms. Straw-Thomas, and pointed out that he now had pain in his right leg, as opposed to his left leg.

The Employer's attempt to suggest that the Claimant fabricated his claim after consulting with his attorney is also misplaced. The Claimant contacted his attorney after Ms. Straw-Thomas told him that there had been no accident or injury on April 6, and that any benefits in connection with his 1996 claim were time-barred. The Claimant was certainly entitled to seek legal advice, and neither the fact that he did so, nor the timing, suggest fabrication.

Employer argues that a review of the Claimant's recorded statement of May 14, 2001, and his delay in seeking medical care, compel the conclusion that the Claimant injured his back at home when he rolled off a couch. I do not interpret the Claimant's recorded statement to mean that he accidentally fell off his couch, as opposed to rolled off in an attempt to get up. Nor do I agree that the Claimant delayed in seeking medical treatment. At the latest, he made his appointment with Dr. Fedder on the Tuesday after the Friday when his problems began, and saw him on the following Wednesday.

Nor does the fact that the Claimant reported some of his hours under his son's number convince me that he has fabricated his account of the circumstances on April 6, 2001 that led up to his back pain. The Claimant acknowledged this practice, claiming that it was common on the waterfront, and was a way to let less senior workers accrue enough hours to qualify for benefits. While this practice may not be legitimate, it does not automatically translate to the conclusion that the Claimant has fabricated his account of the incident.

Thus, I find that the Claimant suffered a harm or injury, in other words, back pain, on April 6, 2001, during the course and scope of his employment, as he engaged in repetitive reaching, bending, and twisting. I do not find it especially probative that the Claimant did not describe an accident or injury, for the simple reason that there was not one, as those terms are commonly understood. Rather, the Claimant's pain came about after an extended period of time spent bending, twisting, and reaching. In this sense, it is correct to say that his pain was insidious, and without accident or incident. However, as defined by the Board and the Courts, there was something that went wrong within the Claimant's frame, and thus there was an injury within the meaning of the Act.

Thus, I find that the Claimant has established that he is entitled to the statutory presumption that he suffered an injury that arose in the course of employment as well as out of employment. I also find that the Employer has not provided specific and comprehensive medical evidence severing the connection between the Claimant's harm and his employment. The Employer offers the report of Dr. Miela, who described the Claimant's condition as non-work related. However, there is no indication that Dr. Miela was aware of the Claimant's activities, that is, the repetitive reaching and twisting, on April 6, 2001. Dr. Lancelotta's report indicates that the Claimant described his activities of April 6, 2001. Yet, based on the fact that the

Claimant did not describe any accident, as well as the fact that he told Dr. Miela that his pain had developed insidiously without accident or incident, Dr. Lancelotta concluded that the Claimant's symptoms were not work-related. However, Dr. Lancelotta did not address the connection between the Claimant's repetitive reaching and twisting, and his symptoms. I do not find either the report of Dr. Miela or Dr. Lancelotta sufficient to sever the statutory presumption of a connection between the Claimant's harm and his employment.

Accordingly, I find that the Claimant suffered an accident or injury on April 6, 2001, in the course or scope of his employment with the Employer, and that his temporary and total disability from April 25, 2001, to June 24, 2001 was due to that injury.

Average Weekly Wage

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. *Lozupone v. Stephano Lozupone and Sons*, 12 BRBS 148, 156-57 (1979).

The Board has held that 34.5 weeks' wages do constitute "substantially the whole of the year," *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990), but 33 weeks is not a substantial part of the previous year. *See Lozupone*, 12 BRBS at 156 (citing *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978)). On the other hand, in *Matulic v. Director, OWCP*, the Ninth Circuit concluded that "when a claimant works more than 75% of the workdays of the measuring year the presumption that § 910(a) applies is not rebutted." 154 F.3d 1052, 1058 (9th Cir. 1998). The court found that any overcompensation which occurs as a result of using this method was contemplated by Congress. *Id.* The court noted that the record in that case did not support a finding that the Seattle port was not open year-round or that the work schedules were sporadic, and therefore the ALJ had erroneously concluded the claimant's work was seasonal or intermittent. *Id.*

I note that this matter did not originate in the Ninth Circuit, and therefore, the *Matulic* decision is not binding. However, even if it were, the *Matulic* holding is inapplicable to the facts of this case. In *Matulic*, the Ninth Circuit held that § 910(c) may not be invoked in cases in which the only significant evidence that the application of 910(a) would be unfair or unreasonable is that claimant worked more than 75% of the days in the year preceding his injury. *Matulic v. Director*,

OWCP, *supra* at 1058.³

This interpretation of *Matulic* also comports with the Benefits Review Board's decision in *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987):

In the instant case, *if claimant's average weekly wage were to be calculated under Section 10(a), certain factors which affected claimant's pre-injury wage-earning capacity—such as the fact that he was laid off twice during the year preceding his injury due to weather-induced unavailability of work and the fact that on certain days he received only “show-up” pay because there were no duties for him to perform—would not be accounted for,* and the average weekly wage calculation thus would not reflect what claimant would have earned had he continued to work in the construction industry beyond the date of his injury. These factors were noted by the administrative law judge, and they support his use of Section 10(c) as the provision under which claimant's average weekly wage should be calculated. We therefore hold that the administrative law judge acted within his discretion in utilizing Section 10(c) to determine the wage on which claimant's compensation payments should have been based

Gilliam v. Addison Crane Co., *supra*, 21 BRBS at 93 (emphasis added).

This reasoning is also consistent with the BRB's rationale in *Duncan*, where the BRB found that the ALJ had erred in considering only the length of the claimant's employment and not the nature of the employment. 24 BRBS at 136. Thus, in determining whether 10(a) applies, both the length of the employment and the nature of the employment must be considered in determining whether the Claimant's average weekly wage should be calculated according to 910(a) or 910(c).

In this case, the records from the Steamship Trade Association reflect that the Claimant worked 222 of the 365 days preceding his injury, or 61% of that year.⁴ However, a review of those records shows that the Claimant's work schedule was erratic, and there were days and even weeks when he did not work. According to the Claimant, he works when there is a job available, whether it is for the Employer, or whether he is “shaking” out of the union hall.

³ In a similar case, Administrative Law Judge Lindeman found that even though the Claimant worked 75% of the previous year, the fact that the Claimant could not be classified as a five or six day employee suggested that 10(a) was not the appropriate manner in which to determine his average weekly wage. *See Walker v. Stevedoring Services of America*, 1998 LHC 1605 (April 8, 1999).

⁴ This does not include the days when the Claimant reported his hours under his son's number. This number is also somewhat misleading, as the Claimant testified that he frequently was paid for performing two jobs at the same time, meaning that many of these hours are the result of double-counting.

Also, a review of the Claimant's wage statement, broken down by week, reveals vast differences in his amount of income from week to week. Therefore, it is impossible for me to conclude whether the Claimant's average weekly wage would be based on either a five-day work week or a six-day work week. I am not able to draw a reasonable inference from the record as to the regularity of the Claimant's work schedule. For the foregoing reasons and in spite of the fact that the Claimant appears to have worked as a rigger for approximately 61% of the year preceding his injury, I nevertheless conclude that it would be neither fair nor reasonable to apply Section 10(a) of the Act when calculating the average weekly wage of the Claimant.

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. 33 U.S.C. §§ 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

Section 10(b) directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury in the same or similar employment in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135 (1990); *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). No such evidence has been introduced into the record; therefore, I will determine the Claimant's average weekly wage in accordance with Section 10(c) of the Act.

Whenever Sections 10 (a) and (b) cannot "reasonably and fairly be applied," Section 10 (c) is applied. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Gilliam v. Addison Crane Company*, 22 BRBS 91, 93 (1987). The use of Section 10 (c) is appropriate when Section 10 (a) is inapplicable and the evidence is insufficient to apply Section 10 (b). *See generally Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 237 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303 (1978). "Section 10(c) is clearly the appropriate section to apply where the claimant's work is not available on a year-round basis, since use of section 10(a) would yield an unfair and unreasonable approximation of claimant's annual wage-earning capacity." *Lozupone*, 12 BRBS at 156-157. The 52 week divisor of Section 10(d) must be used where earnings records for a full year are available. *Roundtree v. Newport Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981). *Cf. Brown v. General Dynamics Corp.*, 7 BRBS 561 (1978). *See also McCullough v. Marathon LeTourneau*

Company, 22 BRBS 359, 367 (1989).

Based on the law as described above, I find that the most fair and accurate determination of the Claimant's average weekly wage is made by totaling his pay for his 222 days of work, and dividing it by a 52 week year, since this reflects the Claimant's actual income. This method takes into account that the Claimant could not have earned wages during all of the 52 weeks, since he was only able to obtain work when it was available.

Reviewing the records from the Steamship Trade Association, I find that from April 6, 2000, to April 5, 2001, the Claimant earned a total of \$59,009.93. This figure, when divided by 52 weeks, yields an average weekly wage of \$1,134.81.⁵ Thus, I find that the Claimant's average weekly wage is \$1,134.81.

ORDER

On the basis of the foregoing, Employer shall:

1. Pay to the Claimant compensation benefits for temporary total disability based on a wage earning capacity of \$1,134.81 per week from April 25, 2001 to June 24, 2001.

2. Pay to the Claimant all medical benefits to which he is entitled under the Act.

3. Pay to the Claimant's attorney fees and costs to be established by a supplemental order.

SO ORDERED.

⁵ Claimant argues that the average weekly wage should be calculated by dividing the income shown on the Claimant's 2000 federal tax return by 52, yielding the amount of \$1,217.50. There are several flaws in this argument. First, the 2000 tax return includes income for only nine months of the year preceding April 6, 2001. Second, it is a joint return filed by the Claimant and his wife, and no W-2's or any other information is attached that would indicate whether the income was attributable solely to the Claimant, or whether some of the income was his wife's. Finally, Claimant's counsel's statement that this figure is "not contested" is disingenuous: the Employer has never, by word or action, agreed to it.

A
LINDA S. CHAPMAN
Administrative Law Judge